

IN THE MISSOURI SUPREME COURT

SUPREME COURT CASE NO. 86761

STATE OF MISSOURI, ex rel.

DAVID LOE, and RICHARD HILL, Sheriff of Stone County, Missouri,

Relators,

v.

THE HONORABLE GEORGE C. BALDRIDGE, Senior Judge, Lawrence

County, Missouri, 39th Judicial Circuit at Mt. Vernon, Missouri,

Respondent.

ORIGINAL PROCEEDING IN MANDAMUS

RELATORS' BRIEF

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JURISDICTIONAL STATEMENT

This is an original action in Mandamus, which seeks an Order compelling The Honorable George C. Baldrige, Senior Judge, Lawrence County, Missouri, 39th Judicial Circuit at Mt. Vernon, Missouri, to enter an Order sustaining Relators' Motion for Summary Judgment. The Circuit Court denied Relators' Motion for Summary Judgment on November 11, 2004 (Exhibit U); the Petition for a Writ of Mandamus to the Southern District Court of Appeals was denied on January 27, 2005 (Exhibit V). This Court issued a Preliminary Writ June 21, 2005. The Court has jurisdiction to issue and determine original remedial writs under Article V, Section 4, of the Missouri Constitution.

STATEMENT OF FACTS

Relator, Richard Hill, is the duly elected Sheriff of Stone County, Missouri (Exhibit A - paragraph 5; Exhibit B - paragraph 5; Exhibit C - paragraph 1). As Sheriff of Stone County, Missouri, Relator has supervisory authority over Deputy Sheriffs when acting within the course and scope of their employment as Deputy Sheriffs of Stone County, Missouri. (Exhibit J - paragraph 2). Relator is one of two named defendants in the civil action styled Mary Kuyper v. David Loe and Richard Hill, Circuit Court of Lawrence County, Case Number CV303-430CC alleging negligence on the part of David Loe, a Deputy Sheriff of Stone County, Missouri, and vicarious liability on the part of Relator, arising out of the shooting death of Charles Kuyper on or about June 4, 2001. (See Exhibit A).

On or about June 4, 2001, Defendant Loe was dispatched by Stone County 911 Services to respond to a call of concern at the home of Plaintiff, Mary Kuyper. (See Exhibit C - page 72, line 13 through page 74, line 9). During the 911 call, Albert Miller, a concerned citizen of Stone County, Missouri, reported that Charles Kuyper was present at the residence of Plaintiff, Mary Kuyper, that Charles Kuyper had a knife, and that he had "gone crazy." (Exhibit D - page 27, line 9 through page 28, line 22; Exhibit E - Stone County 911 Services recording of June 4, 2001).

Upon arriving at the residence of Plaintiff, Mary Kuyper, Defendant Loe, accompanied by Deputy Richard Hayes of the Stone County Sheriff's Department, attempted to make contact with the suspect, Charles Kuyper, by entering the residence. (Exhibit C - page 88, line 22 through page 90, line 22; Exhibit G - page 7,

line 16 through page 8, line 1, also page 39, line 3 through page 42, line 17). Upon entering the residence, Defendant Loe announced his presence and proceeded downstairs to the basement of Mary Kuyper's residence to make contact with the suspect, Charles Kuyper. (Exhibit C - page 119, line 19 through page 120, line 16; Exhibit G - page 42, line 18 through page 43, line 15). Upon reaching the basement level of Mary Kuyper's residence, Defendant Loe observed Charles Kuyper holding an SKS rifle in a low-ready position. (Exhibit C - page 122, line 7 through page 126, line 3). Defendant Loe instructed Charles Kuyper to drop the gun. (Exhibit C - page 126, line 5 through page 131, line 3; Exhibit H - page 39, line 15 through page 44, line 6; Exhibit I - page 16, line 6 through page 17, line 15). Simultaneous with Defendant Loe's instruction to drop his weapon, Charles Kuyper raised the SKS rifle to a firing position. (Exhibit C - page 126, line 5 through page 131, line 3). After instructing Charles Kuyper to drop his weapon, observing Charles Kuyper raise his weapon to a firing position, and believing that Charles Kuyper was going to fire his weapon at him, Defendant Loe fired his weapon in the direction of Charles Kuyper. (Id.) Charles Kuyper died as a result of the gunshot fired by Defendant Loe. (Exhibit A - paragraph 6; Exhibit B - paragraph 6).

As Sheriff of Stone County, Missouri, Relator had supervisor authority of Defendant Loe when Defendant Loe was acting within the course and scope of his employment as a Deputy Sheriff of Stone County, Missouri. (Exhibit J - paragraph 2).

Relator did not fire the shot that resulted in Charles Kuyper's death. Relator was not present on the scene of the shooting. (Exhibit A - paragraph 6; Exhibit B - paragraph 6; Exhibit J - paragraph 4). Relator was not aware that Stone County Sheriff's Department officers had been dispatched to the Kuyper residence until after the shooting incident. (Exhibit K - page 18, lines 7 through 23; Exhibit J - paragraph 5).

Plaintiff has alleged no independently wrongful or negligent acts on the part of Relator. Her lawsuit is maintained against Relator Hill solely on the legal theory of vicarious liability for the alleged negligent acts of Defendant Loe. (Exhibit L - page 110, line 5 through page 111, line 7).

POINTS RELIED ON

I.

Relator Hill is entitled to an Order compelling Respondent to grant Relator Hill's Motion for Summary Judgment because Relator is entitled to immunity from suit on Plaintiff's allegations of vicarious liability in that the Doctrine of Official Immunity shields public officials from liability related to the performance of discretionary duties, and Relator Hill, at all times relevant to the allegations of Plaintiff's Petition, was acting in the course and scope of his duties as Sheriff of Stone County, Missouri, and was acting in a discretionary capacity.

Cases/Authorities

Green v. Denison, 738 S.W.2d 861 (Mo. banc 1987).

State ex rel. Twiehaus v. Adolph, 706 S.W.2d 443 (Mo. 1986).

II.

Relator is entitled to an Order compelling Respondent to grant Relators' Motion for Summary Judgment because Relator cannot be held vicariously liable for the allegedly negligent acts of Defendant Loe in that Relator was not the employer of Defendant Loe and supervisory personnel cannot be held vicariously liable for the negligence of their subordinates.

Cases/Authorities

Davis-Bey v. Missouri Department of Corrections, 944 S.W.2d 294 (Mo. App. W.D. 1997).

ARGUMENT

I.

Relator Hill is entitled to an Order compelling Respondent to grant Relator Hill's Motion for Summary Judgment because Relator is entitled to immunity from suit on Plaintiff's allegations of vicarious liability in that the Doctrine of Official Immunity shields public officials from liability related to the performance of discretionary duties, and Relator Hill, at all times relevant to the allegations of Plaintiff's Petition, was acting in the course and scope of his duties as Sheriff of Stone County, Missouri, and was acting in a discretionary capacity.

A. Jurisdiction.

"A writ of mandamus is appropriate where a court has exceeded its jurisdiction or authority." State ex rel. Public Housing Agency of City of Bethany v. Krohn, 98 S.W.3d 911, 913 (Mo. App. W.D. 2003). "The writ will lie both to compel the court to do that which it is obligated by law to do and to undo that which the court was by law prohibited from doing." Id. "Where the pleadings show that defendant is immune from suit as a matter of law and the trial court refuses to grant summary judgment, a writ of mandamus is appropriate." Id.

B. Standard of Review.

"The denial of a motion for summary judgment asserting the defense of sovereign immunity is reviewed under the same standard of review as an order granting summary judgment." Id. "Appellate review of summary judgment is de novo in a light most favorable to the party against whom the judgment is sought." Id.

A defendant party is entitled to summary judgment upon "showing 1) facts that negate any one of the claimant's elements of facts, 2) that the nonmovant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or 3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense." ITT Commercial Finance v. Mid-Am Marine, 854 S.W.2d 371, 381 (Mo. banc 1993). In this case, there is no genuine dispute as to the essential elements of Relators' entitlement to official immunity from suit on the allegations contained in Plaintiff's Petition.

C. The Official Immunity Doctrine.

This Court has noted "The official immunity doctrine holds that a public official is not civilly liable to members of the public for negligence strictly related to the performance of discretionary duties." Green v. Denison, 738 S.W.2d 861, 865 (Mo. banc 1987). For the purposes of the doctrine of official immunity, a discretionary act, unlike a ministerial act, requires "the exercise of reason and the adaptation of a means to an end and discretion in determining how or whether an act

should be done or a course pursued." Miller v. Smith, 921 S.W.2d 39, 45 (Mo. App. W.D. 1996). Conversely, a ministerial act is one of a clerical nature and is performed "without regard to [the public official's] own judgment or opinion concerning the propriety of the act to be performed." Id. In determining whether a public official's act is discretionary, this Court should be "aware that discretionary functions should not be so narrowly construed so as to frustrate the purpose of the official immunity doctrine, which is to protect those who "with limited resources and imperfect information, are charged with the responsibility of exercising their best judgment in the administration of public affairs." Id. at 45-46.

D. Plaintiff has failed to establish a breach of a ministerial duty.

In order to overcome the defense of official immunity, the plaintiff must show breach of a ministerial duty. State ex rel. Twiehaus v. Adolph, 706 S.W.2d 443 (Mo. 1986). In this case, Plaintiff's Petition merely alleges that Relator should be held vicariously liable for the allegedly negligent acts of Defendant Loe. The Petition "does not aver the existence of either a statutory or departmentally mandated duty, nor does the Petition allege the breach of such a duty. (See Id.) Therefore, "absent these allegations, the pleadings are insufficient to state a claim which is not barred by the doctrine of official immunity as a matter of law." Id.

Despite the absence of any allegation of a breach of a ministerial duty in Plaintiff's Petition, counsel for Plaintiff, in his Return in Behalf of Respondent, The Honorable George C. Baldrige, to Alternative Writ of Mandamus, identifies seven acts or omissions by Relator which purportedly justify the Trial Court's denial of

Relators' Motion for Summary Judgment. They are as follows: 1) that Relator ratified and condoned the unlawful conduct of Defendant Loe, 2) that following the incident in question, Relator began orchestrating a defense of the involved deputies, 3) that he solicited and retained them legal counsel and impeded interviews scheduled by Missouri State Highway Patrol, 4) that he gathered the deputies together to make collaborative notes of the occurrence and failed to preserve those notes, 5) that he permitted David Loe to remain in control of the scene of the shooting, 6) that he failed to allow for the possibility that a deputy might misrepresent what had occurred, and 7) that there is absent from the record any evidence that Relator had made an attempt to properly train his deputies. (Appendix pages 2-3).

Plaintiff's Petition seeks damages for the wrongful death of Charles Kuyper. Items one through six of the list appearing above, even if true, all occurred after Charles Kuyper was deceased. Therefore, they it cannot possibly be considered the proximate cause of Charles Kuyper's death.

With respect to the allegation that there is an absence of the record of any evidence that Relator made any attempt to train his deputies, it is important to note that Respondent/Plaintiff bears the burden of showing that such a duty is ministerial rather than discretionary. It is undisputed that Relator, when making hiring decisions, followed Missouri POST standards in that each of his deputies was twenty-one years of age, completed high school education or GED, and had completed a 470-hour certification. (Exhibit K - page 8, lines 17 through 25). Therefore, the duty to provide the training for his deputies required by law, even if considered ministerial

rather than discretionary, was met by Relator. The decision of whether to provide further training beyond that which is required by statute or regulation, and the topics on which to provide such additional training, resources permitting, would certainly be a discretionary decision, and one encompassed by the official immunity doctrine.

E. Conclusion.

Sheriff Richard Hill did not cause or contribute to cause the death of Charles Kuyper. Any association Relator had with the events of the evening of June 4, 2001, were as a result of the exercise of his discretionary capacity as a supervisor of the deputy sheriffs of Stone County, Missouri. Therefore, Relator is immune from allegations of negligence related to the exercise of those discretionary duties.

II.

Relator is entitled to an Order compelling Respondent to grant Relators' Motion for Summary Judgment because Relator cannot be held vicariously liable for the allegedly negligent acts of Defendant Loe in that Relator was not the employer of Defendant Loe and supervisory personnel cannot be held vicariously liable for the negligence of their subordinates.

A. Jurisdiction.

An original remedial writ after denial of summary judgment is proper if it will prevent unnecessary, inconvenient and expensive litigation. (See State ex rel. Springfield Underground, Inc. v. Sweeney, 102 S.W.3d 7, 8-9 (Mo. banc 2003)). Trial of this case on behalf of Relator would be expensive and could last more than a week. This Application for Writ raises a straightforward issue of law and is not a jury question. No purpose would be served by delaying consideration of Relators' second point relied on until such time as a trial is completed and an appeal can be taken.

B. Standard of Review.

"Appellate review of summary judgment is de novo in the light most favorable to the party against whom the judgment is sought." State ex rel. Public Housing Agency of City of Bethany, 98 S.W.3d at 913. A defendant party is entitled to summary judgment upon "showing 1) facts that negate any one of the claimant's elements of facts, 2) that the nonmovant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or 3) there

is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense." ITT Commercial Finance, 854 S.W.2d at 381.

C. Only employers can be held liable under the doctrine of Respondeat Superior.

"Under the doctrine of respondeat superior, an employer is liable to third parties for torts committed by an employee, if the tort was committed while the employee was engaged in activities within the course and scope of his or her employment." Davis-Bey v. Missouri Department of Corrections, 944 S.W.2d 294, 298 (Mo. App. W.D. 1997). In this case, it is undisputed that Relator was not Defendant Loe's employer, he was merely his supervisor. (Exhibit J - paragraph 2). Defendant Loe was an employee of Stone County, Missouri. (Exhibit A - paragraph 4; Exhibit B - paragraph 4; Exhibit C - page 21, lines 3-8 and page 21, line 24 through page 22, line 1). Therefore, respondeat superior does not apply.

D. Conclusion.

The allegations against Relator in Plaintiff's Petition consist solely of vicarious liability for the alleged negligence of Defendant Loe, nothing more, nothing less. The fact that Relator is not the employer of the alleged negligent actor, clearly negates one of the critical elements of Plaintiff's claim against Relator. He is, therefore, entitled to summary judgment and Respondent was in error in failing to sustain his motion.

CONCLUSION

WHEREFORE, Relators respectfully request this Court make permanent its preliminary Writ of Mandamus directing Respondent to enter an Order granting Relators' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND FILING

The undersigned certifies that two (2) complete copies of Appellant's Brief were served on counsel of record Richard L. Anderson, Attorney for Respondent, P.O. Box 2145, Branson West, Missouri 65737-2145; The Honorable George C. Baldrige, Judge, P.O. Box 426, Joplin, Missouri 64802; and Richard Crites, Richard D. Crites & Associates, 2045 S. Glenstone Avenue, Suite 201, Springfield, Missouri 65804, by U.S. mail, postage prepaid, this 19th day of August 2005.

Further, the undersigned certifies that: (1) Relators' Brief complies with the limitations contained in Special Rule Number 1(b); (2) excluding the cover, certification of service/compliance, signature block and appendix, there are 2,945 words in Relators' Brief; (3) the name and version of the word processing software used to prepare Relators' Brief is Microsoft Word 2002; and, (4) the diskette provided to this court has been scanned for viruses and is virus free.

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